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TWLF

TWLF NEWS & VIEWS

The Official Newsletter of The Weinreb Law Firm, PLLC

1225 Franklin Ave. - Ste. 325 - Garden City, NY 11530 - Tel.: 516-620-9716 - www.weinreblaw.com

In This Issue:

"One Size Does Not Fit All"

In this quarter's newsletter—the second of a two-part series—Elan E. Weinreb, Esq., Managing Member of The Weinreb Law Firm, PLLC, explores ten reasons why in certain cases, commercial litigators should consider commercial mediation as a first option for resolving disputes.

Ten Reasons to Consider Mediation as a First Option for Dispute Resolution (cont.)

Reason No. 4: Neutral Assessment of Case Strengths and Weaknesses

The best commercial litigators recognize that an assessment of both a case's strengths and weaknesses is an essential component of trial preparation. The great orator Cicero

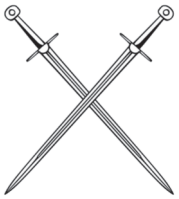
left it on record that he always studied his adversary's case with as great, if not with still greater, intensity than even his own. What Cicero practised as the means of forensic success, requires to be imitated by all who study any subject in order to arrive at the truth. He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.

A type of evaluative mediation known as "information centered mediation" is particularly useful in conducting a strengths and weaknesses analysis. This process involves the appointment of a mediator such as a retired judge having practical or technical expertise who receives written submissions and significant documents from the parties in advance of meeting with them. After reviewing these materials and hearing from the parties or their attorneys, the appointed mediator renders an opinion on "the likely outcome and value of the dispute," which he or she proceeds to defend.

Note: Citations to the various sources referenced in this article are available upon request by calling (516) 620-9716 or sending an e-mail to office@weinreblaw.com.

"Ten Reasons to Consider . . ." — *cont. from Page 1*

It is in the defense of the mediator's opinion that an astute commercial litigator can potentially strike gold by appreciating the mediator's opposing or "foil" perspectives on the case. If these views cannot be countered, quick settlement of a case may become more attractive. On the other hand, if such views can be countered and a resulting change in mediation opinion occurs, negotiating for more favorable settlement terms becomes a strong possibility. And even where settlement does not ultimately occur and a case returns to a litigation track, analysis of case strengths and weaknesses will have occurred in analyzing the mediator's independent opinion.



Reason No. 3: Reduced Discovery Expenses

Clients are either already well aware or can easily find out from legal information websites that the discovery process in litigation of any type "can be lengthy, expensive, intrusive, and frustrating." While in commercial mediation, it is practically impossible to completely eliminate all discovery in advance of mediation sessions, "[e]ssential discovery can be conducted early, setting the stage for prompt resolution that saves the parties the vast bulk of fees and expenses that they otherwise would have incurred."

Reason No. 2: "Win-Win" Potential

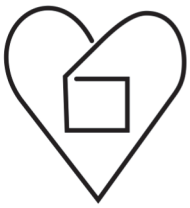
When judges, court attorneys, or even the parties' attorneys in a standard commercial litigation end up settling a matter without mediator assistance, it is often done in the limited framework of compromise—what is also known as a "win-lose" framework because the parties sacrifice items to gain others or avoid liability exposure. This is largely because the restrictive structure of litigation limits available remedies and options. Courts, for example, are rarely able to compel parties to interact with each other outside of the scope of contractual arrangements that they have established or award remedies to them beyond those available at law.

However, commercial mediators are not so limited and are often able to propose extra-legal, creative options that open the proverbial door to collaborative "win-win" conflict resolution—what the Hon. Marilyn Genoa, current Chair of the Nassau County Bar Association's Alternative Dispute Resolution Advisory Council, has characterized as "the best solution for all of the parties."

"Ten Reasons to Consider . . ." — *cont. from Page 2*

In complex commercial matters where there may be significant business interests at issue between parties who may need to ultimately preserve their relationships; in family, estate and community based cases where the future interaction of the parties remains crucial, a mediated resolution which enables the parties to come up with a win-win creative solution tailored to the specific needs of the parties is a home run both for the litigants and their attorneys.

Mediator-facilitated or party-proposed options that ultimately resolve cases are sometimes "out of the box." "In one case in federal court[,] a matter resolved when one of the parties offered flying lessons to the other side as part of the settlement." But there is little doubt that the commercial litigator who offers clients both "in box" and "out of box" solutions in commercial mediation has a competitive advantage over his or her colleagues who offer only "in box" options. This is especially so since 2008, when professional, scientific, and technical organizations were reported to have retained over 1,300 mediators to manage conflict resolution, and this hiring trend is expected to continue.



Reason No. 1: Client Retention Driven by Cost Savings

Finally, commercial mediation is often superior to commercial litigation because it offers a greater probability of client retention driven by cost savings. In the United States, "parties spend $50,700 on average on each litigated case, [but] only $7,500 ($3,500 per party [in a two-party case]) for resolving their case by mediation, a cost-savings of approximately 85%." Outside of the United States, the savings are similarly significant. Thus, for today's clients, "what raises eyebrows isn't the provision of mediation, it is when mediation isn't offered as an option."

Furthermore, it is not only clients who stand in support of commercial mediation over commercial litigation, but the transactional attorneys counseling them, who in turn affect the future retention of commercial litigators. Recently, Loretta Gastwirth, Chair of the Nassau County Bar Association's Alternative Dispute Resolution Committee and a commercial litigator herself, advised attorneys that "inserting a mediation clause in a contract . . . is a no-brainer" in light of its potential to "save clients tons of money in the long run . . . ." The proverbial stage for commercial mediation is thus now being set by clients' transactional attorneys prophylactically, well in advance of litigation commencing.

"Ten Reasons to Consider . . ." — *cont. from Page 3*

In such circumstances, there is no real maneuverability for commercial litigators: if they cannot work within the mediation-friendly framework of the contracts to which potential clients have been bound, they will likely abandon them for attorneys who are able to work within that framework.

Welcome to tomorrow's commercial litigation environment; in this brave new world, "kill or be killed" has been replaced by "mediate or starve."

Conclusion: Towards the Future

It bears emphasis that commercial mediation—or any dispute resolution process, for that matter—is not and cannot be a talismanic panacea. "One size does not fit all" applies equally to commercial litigation and commercial mediation such that the latter is optimal only in appropriate cases, not every case. It is for this reason that some practitioners refer to ADR as "Appropriate Dispute Resolution" instead of "Alternative Dispute Resolution."

However, as "mediators, lawyers, and their clients gain more experience with mediation, fewer and fewer types of disputes will seem less amenable to the process." Along with other alternative dispute resolution disciplines, it is not a question of "if" but "when" commercial mediation becomes "the elephant hovering over the chipmunk of litigation." And at the end of the day, even those commercial litigators who stubbornly cling to the gladiatorial mindset of days gone by may come to welcome the turning of the tide. After all, it was no less than the great Chinese general Sun Tzu who declared, "For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."